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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

RODNEY AND EMILY SPENDLOVE

APPELLANTS,

V.

ANCHORAGE MUNICIPAL ZONING
BOARD OF EXAMINERS AND APPEALS,
AND UPPER DE ARMOUN AREA HOMEOWNERS
ASSOCIATION, INC.,

APPELLEES.

ON APPEAL FROM THE ALASKA SUPREME COURT

JURISDICTIONAL STATEMENT

RODNEY AND EMILY SPENDLOVE
P.O. BOX 144
ANCHORAGE, ALASKA 99510

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ANCHORAGE, ALASKA 99510

QUESTION PRESENTED

Does Alaska Statute 22.20.020. Disqualification of judicial officer for cause, deny substantive due process and equal protection under the Fourteenth Amendment, when recusal is refused on the following undisputed facts:

1) the trial judge acts as legal advisor and vice-chairman to an organization coordinating its activities with appellees to close Mr. Spendlove's gravel operation;

2) the judge acts as vice-chairman of and organization receiving funding from a party to this case; which party is also Mr. Spendlove's major competitor in the gravel business?

PARTIES BELOW

All of the parties appearing in the Alaska Supreme Court are listed in the caption.

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INTRODUCTORY PRARGRAPH

Appellants Rodney and Emily Spendlove, (Plaintiff below), appeals from the final order and judgment of the Alaska Supreme Court entered 5 April,1985, denying appellants' petition for rehearing, and its judgment entered 22 February,1985.

OPINIONS BELOW

The opinion of the Alaska Supreme Court which appears at appendix 24, is not reported at this time.

The final judgment of the superior court is unpublished at appendix 18.

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(2).

Rodney and Emily Spendlove appealed a decision of the Anchorage Zoning Board to the state superior court. The Zoning Board had limited the Spendloves gravel extraction operation to 7½ acres out of their twenty-two acre federal homestead. After a trial de novo in the superior court, the court enjoined the Spendloves from extracting any gravel. The Alaska Supreme Court affirmed.

The Spendloves had demanded the superior court judge's recusal under Alaska Statute 22.20.020. The motion was denied. The application of the statute was challenged as violating the Fourteenth Amendment.

The challenge was presented on the petition for rehearing.

This is an appeal from a final judgment of the Alaska Supreme Court entered 22 February,1985, and denial of a petition for rehearing entered 5 April,1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment

§1 ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Statute

22.20.020. Disqualification of judicial officer for cause.

(a) A judicial officer may not act as such in a court of which the judicial officer is a member in an action in which

(1) the judicial officer is a party or is directly interested;

(5) either party has retained the judicial officer as their attorney or has been professionally counseled by him in any matter within two years preceding the filing

of the action;

(6) the judicial officer feels that, for any reason, a fair an impartial deicision cannot be given.

STATEMENT OF THE CASE

The superior court trial judge was disqualified from hearing the case because: 1) he had a direct conflict of interest as vice-chairman of a non-profit organization whose program included restricting gravel operations like the Spendloves, in order to gain national recognition for Anchorage, Alaska as a model city; 2) his organization, of which he was vice-chairman, received funding from the Spendloves' major competitor; which competitor was a cross-appellant in the superior court in this case.

Mr. Spendlove demanded the judge's recusal, but was denied. [TR. 526 et sequel. R.151-155.] The following letter was placed into evidence at the recusal hearing. None of its statements were denied. (Appendix 44)

RICE, HOPPNER, HEDLAND, FLEISCHER &
INGRAHAM
1016 West 6th Avenue, Suite 400
Anchorage, Alaska 99501
(907) 279-5528

October 12, 1978

The Honorable James K. Singleton
Superior Court Judge
303 "K" Street
Anchorage, AK 99501

RE: Spendlove v. Municipality
and Gellert

Dear Judge Singleton:

.....

As Your Honor will recall, the appellant in this case is Mr. Gellert.

In the companion case, the Hillside East Community Council sought and was granted leave to intervene. The involvement of Mr. Gellert and the Hillside East Community Council came up at the hearing on the application for stay. Mr. Spendlove had taken the position in this case that Mr. Gellert was in fact acting on behalf of Anchorage Sand and Gravel, which is owned by Alaska Basic Industries, which is in turn owned to the extent of about 71% by Mr. Gellert's relatives. Mr. Spendlove's position in this case was that the opposition to the gravel pit was in fact an attempt to eliminate him as a gravel pit operation so that Anchorage Sand and Gravel could get the business from the Joint Venture doing the road project that Mr. Spendlove would have had if his gravel operations had not been stopped by the Municipality.

At all pertinent times I have been aware of the fact that you were the vice-chairman of Breakthrough and often served as its spokesman. I was not aware until after receiving the October 3, 1978 decision that Anchorage Sand and Gravel was a contributor to Breakthrough, or that Mr. Herb Lang, who I believe to be president of Anchorage Sand and Gravel and who is listed as registered agent for both Anchorage Sand and Gravel and Alaska Basic Industries, was a member of the Breakthrough Steering Committee. Other information of which I had previously been unaware came to my attention by virtue of an article that appeared in the Anchorage Times on October 6, 1978, and inquiries I have made as a result of the article. Specifically, this information

includes:

(1) Approximately two and one-half months ago the Municipality of Anchorage, acting through Mr. Mitch Gravo, an assistant to the city manager, instigated the preparation of an application to the National Municipal League to have Anchorage declared an "All-America City."

(2) The justification for the application, as set out therein, was (a) the activities of Community Councils and (b) the activities of Breakthrough. Preparation of the application was coordinated by Mr. Gravo, Your Honor providing the input relating to the Breakthrough portion, and Ms. Jean Buchanan providing the input relating to the Community Council portion. Mr. Gravo described the relationship between Your Honor, Ms. Buchanan and himself with respect to preparation of the application as a "tripartite" one, although I understand that all three persons did not meet as a group, and that in general, Mr. Gravo dealt separately with you and with Ms. Buchanan.

(3) Several drafts of the application were prepared. According to Mr. Gravo, he discussed these drafts by telephone individually with you and with Ms. Buchanan. One of the drafts specifically referred to Community Council accomplishments justifying the all-American city designation as including the action of the Hillside East Community Council in shutting down a gravel pit that its members found offensive. I do not think anyone will dispute the fact that this was the Spendlove pit.

(4) On or about September 5,

1978, the final draft of the application had been prepared. According to Mr. Gravo, it was signed only by Jean Buchanan because there was room for only one signature on the form. He said that prior to its submission, this final draft had been reviewed by you and by Ms. Buchanan. Among the activities of the Community Councils cited in this draft are "prohibiting gravel pit operations in certain areas. . . ." The application lists as active leaders three Community Council representatives and three Breakthrough representatives. One of the Community Council representatives is Mr. Gary Thurlow who is also on the Breakthrough Steering Committee and who I believe to have been instrumental in the creation of Breakthrough. A second is Ms. Toni Jones, whom I believe to be employed in Mr. Thurlow's office. Both are apparently active on the Board of the Federation of Community Councils and I do not intend to suggest any impropriety whatsoever on the part of either Mr. Thurlow or Ms. Jones.

Thus, it appears that the Municipality, the Community Councils, and Breakthrough had a joint interest in supporting and furthering the "All-American City" application. It further appears that there was cooperaton and some overlap in personnel between Breakthrough and the Community Councils. It is clear that the Hillside East Community Council was active in the opposition to the Spendlove Gravel Pit, and that Anchorage Sand and Gravel was allegedly interested financially in the outcome of the decision in a manner adverse to the interest of Mr. Spendlove. It also appears that the

joint action of the Municipality, Breakthrough, and the Community Councils in obtaining all-American city recognition was based in part upon the asserted success in shutting down Mr. Spendlove's pit. Selection of Anchorage as a finalist for all-American city recognition occurred on or about September 26, but was subject to a "no release" until October 6, 1978.

Under the above circumstances, I have no alternative but to conclude that, given Your Honor's association with Mr. Lang with respect to Breakthrough, Anchorage Sand and Gravel's contribution to Breakthrough, the alleged interest of Anchorage Sand and Gravel in the outcome of the Spendlove case adverse to the interest of Mr. Spendlove, the asserted interest of the Hillside East Community Council in the outcome of the case adverse to the interest of Mr. Spendlove, and Your Honor's participation in the joint efforts of the Community Councils, Breakthrough, and the Muncipality in obtaining All-American City recognition for Anchorage based in part upon shutting down or prohibiting gravel pits, there resulted a situation in which Your Honor's handling of the litigation involving the Spendlove gravel pit raised questions of potential relationships, or the appearance thereof, that would be within the purview of A.S. 22.20.020 and similar promulgations and should therefore have been disclosed to counsel involved in the case. No such disclosure was made.

I must therefore suggest that Your Honor should not participate in any further proceedings in this matter.

Additionally, since the decision of October 3, 1978, postdated the situation discussed above, it appears that this decision should be subject to reconsideration on the merits of another judge. Procedurally I am not sure what the next appropriate step is, and I have no desire to cause embarrassment to any person. It is my hope that this letter, with copies to opposing counsel will result in a just resolution of the situation.

Sincerely,

/s/
John S. Hedland

JSH/rl

cc: Robert Mintz, Esq.
Allen Tesche, Esq.

THE FEDERAL QUESTION IS SUBSTANTIAL

I. The application of AS 22.20.020 violates the right to an impartial, disinterested judge protected under the Fourteenth Amendment guarantees to due process and equal protection.

The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonable question his impartiality on the basis of all the circumstances. The provision for disqualification is not a court-made rule. It is a substantive right granted by the legislature under AS 22.20.020.

The totality of the facts as shown require recusal. The reasonable question is raised in the mind of the public who

must believe in the total integrity and impartiality of their judges. The appearance of partiality does not reassure a public already skeptical of judges, lawyers, and the legal system.

There is a maxim of law regarding judicial action that has Constitutional bearing on the validity of the judgment in this case:

NO MAN OUGHT TO BE A JUDGE IN HIS OWN CAUSE.

This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has <u>no jurisdiction</u> to determine the cause.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510,532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. U.S., 348 U.S. 11,14.

In re Murchison, 349 U.S. 133,136(1955).

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative

proceedings safeguards the two central concerns of procedural due process:

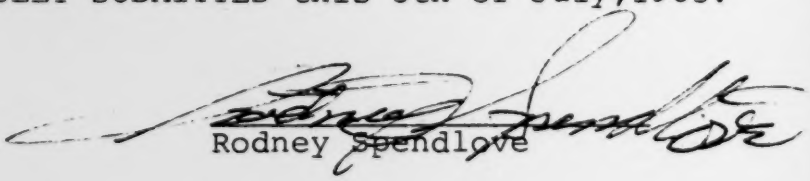
1) the prevention of unjustified or mistaken deprivations;

2) the promotion of participation and dialogue by affected individuals in the decisionmaking process. Carey v. Piphus, 435 U.S. 247,259-262,266-267(1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distroted conception of the facts or the law. Mathews v. Eldridge, 424 U.S. 319,344(1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123,172(1951)(Frankfurter, J., concurring). In this way the Constitution ensures

that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the judge is not predisposed to find against him.

CONCLUSION: The application of AS 22.20.020 to deny recusal of a judge whose interest and financial conflicts cannot be reasonably questioned, denies Due Process and Equal Protection under the Fourteenth Amendment. The United States Supreme Court should take jurisdiction of this appeal on the federal question presented.

RESPECTFULLY SUBMITTED this 5th of July, 1985.



Rodney Spendlove

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IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

RODNEY and EMILY SPENDLOVE,)
)
Appellants,)
)
vs.)
ANCHORAGE MUNICIPAL ZONING)
BOARD OF EXAMINERS AND)
APPEALS, et al.,)
)
Appellees,)
)

No. 3AN-78-3303 CIV

FINAL JUDGMENT

The Court having entered its Findings of Fact and Conclusions of Law:

HEREBY ORDERS, ADJUDGES, DECLARES AND DECREES THAT:

1. A mineral or natural resource extraction use operation on property of Appellants Spendlove in Government Lot 2 of Section 30, Township 12 North, Range 2 West, Seward Meridian, Alaska did not exist as of April 24, 1969; nor did the activity on the land which would be

necessary for the continued existence of such a use occur on that property in any year prior to 1975; if then.

2. Appellants Spendlove are enjoined from, and shall neither conduct nor permit others to conduct, mineral or natural resource extraction operations on Government Lot 2, Section 30, Township 12 North, Range 2 West, Seward Meridian, Alaska; except in conformity with such lawful special exception or conditional use as they may hereafter obtain, if any, from the proper authorities under existing law; further except as such extraction or operations may become lawful, if ever, through a rezoning or change in the legislation respecting land use in the area.

3. Appellants Spendlove shall prepare, after consultation with the Upper DeArmoun Area Homeowners Association, Inc., and with the prior

approval of the Department of Public Works of the Municipality of Anchorage, a suitable plan for abatement of the hazards presently existing on the Spendlove property resulting from placement of certain overburden in the area south and west of the public road within Government Lot 2, and for restoration and revegetation of that property to a safe and stable condition in conformity with approved zoning, environmental, and fire and life safety ordinances and regulations of the Municipality of Anchorage. Upon approval of that plan by the Municipal Public Works Department, the Spendloves shall execute that plan forthwith.

4. A public right-of-way for a road exists through Government Lot 2 and between the two Spendlove View Heights Addition No. 2. This right-of-way is centered upon the centerline of the

roads and track which existed in the period 1969-1976, and is for roads meeting standard municipal mountain road specifications. Appellants and Appellees may further refine and redefine the location of this road in the course of abatement through restoration.

5. The appeal of the Spendloves from the decision of the Anchorage Zoning Board or Examiners and Appeals is dismissed with prejudice.

6. This Court retains jurisdiction over the parties for purposes of enforcing this Judgment. Should the abatement matter not proceed amicably to a fully executed solution, any party may by motion seek relief consistent with this Judgment, including also, for example, an order permitting one or both Appellees to go upon the property to do the work, and to assess

the costs back against the property, and to seek a deficiency, if any.

7. Appellee Upper DeArmoun Area Homeowners Association, Inc. has judgment against Rodney Spendlove and Emily Spendlove jointly and severally, in the amount of $409.00 for costs in this action and $5,000.00 for attorney's fees, for a total judgment of $5,409.00; this Judgement to bear interest at the rate of eight percent (8%) per annum from the date hereof.

8. Appellee Municipality of Anchorage has judgment against Rodney Spendlove and Emily Spendlove, jointly and severally, in the amount of $7,684.40 for costs of this action and $5,000.00 for attorney's fees, for a total judgment of $12,684.40; this Judgment to bear interest at the rate of eight percent (8%) per annum from the date hereof.

DATED this 23 day of July, 1980, at Anchorage, Alaska.

Superior Court Judge

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF

THE STATE OF ALASKA

RODNEY SPENDLOVE and EMILY SPENDLOVE,	)
Appellants,	)
v.	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS & APPEALS and UPPER DeARMOUN AREA HOMEOWNERS ASSOCIATION, INC.,	)
Appellees.	)

File No. 5663

O P I N I O N

ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS and UPPER DeARMOUN AREA HOMEOWNERS ASSOCIATION, INC.,

Cross-Appellants,

v.

RODNEY SPENDLOVE and EMILY SPENDLOVE,

Cross-Appellees.

File No. 5680
[No. 2914 - February 22, 1985]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, James K. Singleton, Judge.

Appearances: Steven P. Oliver, Anchorage, for Appllants and Cross-Appelles. Allan E. Tesche, Assistant Municipal Attorney, Anchorage, Jerry Wertzbaugher, Municipal Attorney, Anchorage, for Appellee and Cross-Appellant Anchorage Municipal Zoning Board of Examiners & Appeals. Edward G. Burton, Burr, Pease & Kurtz, Inc., Anchorage, for Appellee and Cross-Appellant Upper DeArmoun Area Homeowners Association, Inc.

Before: Rabinowitz, Chief Justice, Matthews, Compton, and Moore, Justice. [Burke, Justice, not participating.]

PER CURIAM

This is an appeal from a decision of the Anchorage Municipal Zoning Board denying Rodney and Emily Spendlove (hereinafter "Spendlove") the use of twenty-two and one-half acres for mineral resource extraction. Following a lengthy trial de novo granted at Spendlove's request, the court entered judgment against Spendlove, enjoining mineral or natural resource extraction and dismissing Spendlove's appeal from the decision of the Zoning Board. Spendlove appeals, and the appellees, the Municipality and the DeArmoun Homeowners' Association, cross-appeal for attorney's fees. We affirm.

Prior to April 1969, the Spendlove property was regulated by an interim zoning ordinance of the Greater Anchorage Area Borough that did not categorically prohibit commercial mineral resource extraction

operations. Effective in 1969, through the enactment of a new borough zoning ordinance known as GAAB I-69, the Spendlove property was zoned "U" or unrestricted, a zoning classification that permitted commercial mineral resource extraction only if the use lawfully pre-dated the zoning as a valid non-conforming use or was allowed by special exception. In 1977, the Anchorage Assembly enacted Anchorage Municipal Code 21.55.090 requiring operators of non-conforming gravel pits such as Spendlove's to apply for and receive approval of amortization permits and development and restoration plans. Amortization permits are available only where the exploitation of mineral resourced exists as a non-conforming use and has been in continuous existence since April 21, 1969. Both the Zoning Board and the trial court concluded that

Spendlove had not established a non-conforming use for mineral resource extraction prior to April 1969.

In reaching this conclusion, the trial court held that only those mineral resource extractions that existed as commercial or industrial uses within the meaning of AMC 21.35.020 (B) (59) constitute a use to which the law regarding non-conformities apply.

AMC 21.35.010 (B) (59) provides:

> 'Mineral resources operations' or 'natural resources extractions' ('mineral or natural resources development') means commercial or industrial operations involving removal of . . . gravel, rock, or any mineral and other operations having similar characteristics.[1]

(Emphasis added) Because Spendlove was enjoined from "mineral or

---

1. See also GAAB 21.05.020 (B) (45), the predecessor to AMC 21.35.020 (B) (59).

natural resource extraction operations" it was appropriate for the trial court to determine whether Spendlove had established a commercial use prior to 1969.

The trial court also adopted a "substantial use" test for the level of commercial activity necessary to "rise to the level of a mineral resource extraction." The substantial use test is consistent with zoning policy and favored by commentators:

> Where the loss to the owner arising out of the curtailment of his prior use of the property is insubstantial, the loss is deemed balanced by the resulting effectiveness of the zoning ordinance on the implementation of the comprehensive plan of development of the community and the consequent benefits conferred thereby on all property owners therein.

4 A. Rathkopf, The Law of Zoning and Planning § 51.03, at 51-27 (4th ed. 1984).[2] Substantial evidence exists on

the record to support the court's finding that Spendlove's activities prior to 1969 were sporadic and insubstantial. The superior court properly enjoined Spendlove from mineral or natural resource extraction.

---

2. See 4 N. Williams, American Land Planning § 110.03, at 405-406 (1975); see, e.g., Paukovits v. Zoning Board of Appeals, 412 N.Y.S. 2d 167 (N.Y. App. Div. 1979); Blundell v. City of W. Helena, 522 S.W.2d 661, 666 (Ark. 1975); Ashley v. City of Bedford, 312 N.E.2d 863, 866 (Ill. App. 1974); Town of Lloyd v. Kart Wheelers Raceway, Inc., 283 N.Y.S.2d 756, 757 (N.Y. App. Div. 1967).

Williams provides an extensive list of citations to cases that have "dismissed token and casual operations as insufficient." 4 N. Williams at 409.

As to the appellees' cross-appeal for attorney's fees, we find that the award of $10,000.00 is reasonable and AFFIRM.

Pursuant to Appellate Rule 508 (f) (1), the appellee shall serve

and file with this court by 3/4/85 an itemized and verified bill of costs.

IN THE SUPREME COURT FOR

THE STATE OF ALASKA

RODNEY SPENDLOVE AND EMILY SPENDLOVE,

Appellants,

vs.

ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS & APPEALS AND UPPER DeARMOUN AREA HOMEOWNERS ASSN.,

Appellees.

FILE No. 5663 & 5680

No. 2914 - February 22, 1985

PETITION FOR REHEARING

I. AS 22.20.020 AND ALASKA JUDICIAL CANNONS 2 AND 3 (C) VIOLATE THE U.S. CONSTITUTION BY THEIR APPLICATION TO DEPRIVE MR. SPENDLOVE OF AN IMPARTIAL TRIBUNAL

The evidence is undisputed that the trier of fact in this equitable proceeding had a direct interest in the controversy to close Mr. Spendlove's gravel pit. Judge Singleton was vice-chairman of Breakthrough, an organization coordinating its activities

with Mr. Spendlove's two protagonists, the Municipality and the Hillside East Community Council.

Judge Singleton made no disclosure of his relationship until forced to do so by Mr. Spendlove's attorney. (Exhibit A)

The Judge went so far as to exclude evidence that would show the financial relationship between: 1) Judge Singleton; 2) Breakthrough; 3) Alaska Sand and Gravel-a financial contributor to Breakthrough and main competitor of Mr. Spendlove; 4) Mr. Gellert, appellant in this case and majority owner along with his relatives of Alaska Sand and Gravel.

AS 22.20.020 and Judicial Cannons 2 and 3(C) deprive Mr. Spendlove of Due Process and Equal Protection by their application in this action.

II. MUNICIPAL CODE 21.55.090 VIOLATES THE PROVISIONS OF THE U.S. CONSTITUTION UNDER: 1) ART. 1 §10; 2) THE FOURTEENTH AMENDMENT: ITS APPLICATION TO SPENDLOVE IMPAIRS THE RIGHT TO CONTRACT AND DENIES DUE PROCESS AND EQUAL PROTECTION

The state courts apply 21.55.090 to deprive and impair Mr. Spendlove's right to contract in commerce and deny Due Process and Equal Protection by deciding absolutely contrary to the judicial admissions of record.

The Findings of Fact, (Exhibit B), and the findings of fact from the bench, (Exhibit C), determined that there was a commercial business transacted by Mr. Spendlove prior to 1969 to the time of shutdown. The courts Constitutionally err by deciding contrary to the facts. The validity of the application of any law depends upon the truth of the facts declared. Chaslteton Corp. v. Sinclair, 264 U.S.

543,547(1924; U.S. v. Carolene Products, 304 U.S. 144, 153-154(1938).

FACTS

"I'm not prepared to say-- and I don't think anyone has arg'ed, that no gravel was taken from the premises in the period prior to 1969 or for the period '69 to 75.' (Exhibit C-11)

"From '69 to 73' there is no question that Mr. Spendlove from time to time made sales." (Exhibit C-3)

"On his federal income tax return he listed himself as a excavating contractor." (Exhibit B-7)

"Prior to April 24, 1969 extraction of material from the Spendlove property was from locations other than the extraction site used by the Mat-Su/Stephan Venture in early 1978." (Exhibit B-5)

"In December 1977, Mr. Spendlove entered into a contract with Mat-Su/Stephan Joint Venture to provide in excess of 350,000 tons of material from his property." (Ex. B-9)

20,000 yards of material had been removed from the Spendlove extraction site before Feb. 1978. (Exhibit B-10)

"[i]t was his intent to remove an

> additional 350,000 to 400,000 tons and sell that material to the public." (Ex. B10)

Mr. Spendlove has a federal homestead patent. A federal land patent conveys perfect title to the national government's rights in land. Wright v. Roseberry, 121 U.S. 488; Wilcow v. Jackson, 13 Pet. 511. Those rights are to possess, use, enjoy, and dispose of by alienation. Soulard v. U.S., 4 Pet 511.

It is a judicial fact that prior to 1969 until date of shutdown, Mr. Spendlove used gravel from his land in his business as a commercial real estate developer and excavation contractor, and for sales to the public at large. All of his business activity was accounted for on his return of income forms as a venture for profit under the codified Law Merchant, the Internal Revenue Code.

A sales is a transferring of

property from one person to another, in consideration of a sum of money; or an exchange of one parcel of good for another; or one estate in land is granted in consideration of another.

Mr. Spendlove derived his livelihood directly from his federal patent by contracting under Art. 1 §10 for the alienation of his property rights by sale in the market overt.

The state courts deny Mr. Spendlove his right to contract for his property because they are of the "opinion" that under 21.55.090, "commercial" means something more than what Spendlove was engaged in. Commerce is a generic term of fact, not a quantitive word. Commerce embraces every phase of commercial or business activity. Gibbons V. Ogden, 9 Wheat 1, 190, 191, 215, 229. Commercial means sales in the market overt for profit.

15A C.J.S. Commercial. Mining brings the subject matter of commerce into existence; commerce disposes of it. Carter v. Carter Coal Co., 298 U.S. 238, 304.

Judicial Notice is requested of the Alaska economic facts argued in Hicklin v. Orbeck, 437 U.S. 518 (1978). Alaska's economy prior to the TAPS line was seasonal and determined by government expenditures. Mr. Spendlove is taken out of a generic class of commercial businessmen and deprived of property by a non-existent classification standard. Under HJR 192 before this Court in the Gold Bondholders case, it is the National policy that the dollar will fluctuate as a commodity causing economic cycles. If that is the law, how can Mr. Spendlove be deprived of property because he is subject to the law that determines his

economic activity. That classification is a violation of the Equal Protection and Due Process Standard of the Constitution.

CONCLUSION: Mr. Spendlove was deprived of the right to contract and the right to have that contract unimpaired by municipal ordinance. Judge Singleton is the perfect example of the temptation that is to be averted by removal of a partial adjudicator. He did everything in his utmost to misinterpret the evidence. The evidence was just to overwhelming for even him to find totally against.

Mr. Spendlove has been deprived of Constitutional protections by a non-existent standard capriciously applied in violation of Equal Protection and Due Process.

RESPECTFULLY SUBMITTED this 29th day of March, 1985.

Rodney Spendlove
P.O. Box 144
Anchorage, Alaska 99510

THE SUPREME COURT OF

THE STATE OF ALASKA

RODNEY SPENDLOVE, et al.,	)
	)
Appellants and Cross-Appellees	)
	)
vs.	)
	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS & APPEALS, et al.,	)
	)
Appellees and Cross-Appellants.	)
	)

Superior Court No. 3An 78-3303 Civil

Before: Rabinowitz, Chief Justice Matthews, Compton and Moore, Justices. [Burke, Justice, not participating.]

On consideration of the petition for rehearing, filed on March 29, 1985,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court

at Anchorage, Alaska on April 5, 1985.

CLERK OF THE SUPREME COURT

DAVID A. LAMPEN

ccs: Justices
Counsel
Mr. Rodney Spendlove
Appeals Deputy Clerk, Anchorage
Trial Courts

IN THE SUPREME COURT OF THE

STATE OF ALASKA

RODNEY AND EMILY SPENDLOVE,

APPELLANTS,

VS.

ANCHORAGE MUNICIPAL ZONING
BOARD OF EXAMINERS & APPEALS
and UPPER DeARMOUN AREA
HOMEOWNERS ASSOCIATION,INC.,

APPELLEES.

FILE NO. 5663

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rodney and Emily Spendlove, appellants, hereby appeal to the Supreme Court of the United States from the final judgment of April 5,1985, denying the Petition for Rehearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Rodney Spendlove

1 July, 1985.

RICE, HOPPNER, HEDLAND, FLEISCHER & INGRAHAM
1016 West 6th Avenue, Suite 400
Anchorage, Alaska 99501
(907) 279-5528

October 12, 1978

The Honorable James K. Singleton
Superior Court Judge
303 "K" Street
Anchorage, AK 99501

RE: Spendlove v. Municipality and Gellert

Dear Judge Singleton:

After a great deal of consideration, I have concluded that, however reluctant I am to do so, my oath and responsibility to my client require taht I write this letter. It is my intention to present it to you in chambers with copies to opposing counsel.

Oral argument on appellant's motion for a stay was held before Your Honor on August 10, 1978. At that hearing, the Court indicated very strongly that it was going to construe subsection G in accordance with appellant's position, i.e., that it provided for an automatic special exception, and not follow the Alagco decision. Given that likelihood, it became relevant whether the alleged "gap" in Mr. Spendlove's uses of the pit preceded or took place after a certain date in 1974. The Court

indicated that it would remand the case to the Zoning Board of Examiners and Appeals for a determination of this factual question, simultaneously with expediting briefing of the legal issues in the case. Specifically, the briefing was going to go to other arguments the Municipality intended to raise, apart from subsection G, that would support denial of Mr. Spendlove's right to operate the gravel pit. Because all parties recognized that the construction season was waning away, the Municipality and Mr. Mintz were allowed until August 18 to submit a brief, and I was allowed until August 23 to reply. The Court stated that it would rule on the matter on August 23, or shortly thereafter. The Court also denied the application for stay. The supplemental briefing was to go to a decision on the merits which, if the Court adhered to the position it was tentatively taking on August 10, would moot the balance of the issues on appeal.

On August 11, following a one-day period during which the parties were to attempt to resolve by stipulation the factual question (i.e., when the gap occurred), and upon the parties' inability to stipulate to this question and the Court's ruling that it would not look to the record of the hearing itself in an attempt to resolve it, and it having become apparent that the Board which originally ruled no longer existed such that a remand was possible, the Court stated that if the decision on the legal question was in Mr. Spendlove's favor, no remand would be ordered.

The Municipality and Mr. Mintz filed their briefs on August 18. Mr.

Spendlove's reply was filed before the due date in an attempt to expedite matters. By August 25, there had been no decision. I contacted your secretary to determine whether or not one would be forthcoming before the weekend. Approximately one to two weeks later I again contacted your secretary in an attempt to learn the status of the case and the call was again unproductive. Following several other calls to your secretary or law clerk, I gained the impression about the middle of September that the matter was being considered at that time but had not as yet been ruled upon. On or about September 28, I learned that a decision had been dictated but not signed, and that Your Honor was in Dillingham. I requested of your secretary that you be contacted in an attempt to obtain authorization to release the decision. I informed her that we wer concerned that the construction season would be over before a decision was forthcoming, and that, if the decision was favorable, we wished to commence gravel removal and if it was unfavorable, we wanted to be in a position to seek appellate review in time for it to be meaningful. No decision was forthcoming until the afternoon of Tuesday, October 3, 1978. In that decision, the Court denied the stay and stated that no remand would be ordered, both of which questions had already been resolved, and indicated that it would adhere to the Alagco decision notwithstanding the administrative interpretation of the ordinance in question.

As Your Honor will recall, the appellant in this case is Mr. Gellert.

In the companion case, the Hillside East Community Council sought and was granted leave to intervene. The involvement of Mr. Gellert and the Hillside East Community Council came up at the hearing on the application for stay. Mr. Spendlove had taken the position in this case that Mr. Gellert was in fact acting on behalf of Anchorage Sand and Gravel, which is owned by Alaska Basic Industries, which is in turn owned to the extent of about 71% by Mr. Gellert's relatives. Mr. Spendlove's position in this case was that the opposition to the gravel pit was in fact an attempt to eliminate him as a gravel pit operation so that Anchorage Sand and Gravel could get the business from the Joint Venture doing the road project that Mr. Spendlove would have had if his gravel operations had not been stopped by the Municipality.

At all pertinent times I have been aware of the fact that you were the vice-chairman of Breakthrough and often served as its spokesman. I was not aware until after receiving the October 3, 1978 decision that Anchorage Sand and Gravel was a contributor to Breakthrough, or that Mr. Herb Lang, who I believe to be president of Anchorage Sand and Gravel and who is listed as registered agent for both Anchorage Sand and Gravel and Alaska Basic Industries, was a member of the Breakthrough Steering Committee. Other information of which I had previously been unaware came to my attention by virtue of an article that appeared in the Anchorage Times on October 6, 1978, and inquiries I have made as a result of the article. Specifically, this information

includes:

(1) Approximately two and one-half months ago the Municipality of Anchorage, acting through Mr. Mitch Gravo, an assistant to the city manager, instigated the preparation of an application to the National Municipal League to have Anchorage declared an "All-America City."

(2) The justification for the application, as set out therein, was (a) the activities of Community Councils and (b) the activities of Breakthrough. Preparation of the application was coordinated by Mr. Gravo, Your Honor providing the input relating to the Breakthrough portion, and Ms. Jean Buchanan providing the input relating to the Community Council portion. Mr. Gravo described the relationship between Your Honor, Ms. Buchanan and himself with respect to preparation of the application as a "tripartite" one, although I understand that all three persons did not meet as a group, and that in general, Mr. Gravo dealt separately with you and with Ms. Buchanan.

(3) Several drafts of the application were prepared. According to Mr. Gravo, he discussed these drafts by telephone individually with you and with Ms. Buchanan. One of the drafts specifically referred to Community Council accomplishments justifying the all-American city designation as including the action of the Hillside East Community Council in shutting down a gravel pit that its members found offensive. I do not think anyone will dispute the fact that this was the Spendlove pit.

(4) On or about September 5,

1978, the final draft of the application had been prepared. According to Mr. Gravo, it was signed only by Jean Buchanan because there was room for only one signature on the form. He said that prior to its submission, this final draft had been reviewed by you and by Ms. Buchanan. Among the activities of the Community Councils cited in this draft are "prohibiting gravel pit operations in certain areas. . . ." The application lists as active leaders three Community Council representatives and three Breakthrough representatives. One of the Community Council representatives is Mr. Gary Thurlow who is also on the Breakthrough Steering Committee and who I believe to have been instrumental in the creation of Breakthrough. A second is Ms. Toni Jones, whom I believe to be employed in Mr. Thurlow's office. Both are apparently active on the Board of the Federation of Community Councils and I do not intend to suggest any impropriety whatsoever on the part of either Mr. Thurlow or Ms. Jones.

Thus, it appears that the Municipality, the Community Councils, and Breakthrough had a joint interest in supporting and furthering the "All-American City" application. It further appears that there was cooperaton and some overlap in personnel between Breakthrough and the Community Councils. It is clear that the Hillside East Community Council was active in the opposition to the Spendlove Gravel Pit, and that Anchorage Sand and Gravel was allegedly interested financially in the outcome of the decision in a manner adverse to the interest of Mr. Spendlove. It also appears that the

joint action of the Municipality, Breakthrough, and the Community Councils in obtaining all-American city recognition was based in part upon the asserted success in shutting down Mr. Spendlove's pit. Selection of Anchorage as a finalist for all-American city recognition occurred on or about September 26, but was subject to a "no release" until October 6, 1978.

Under the above circumstances, I have no alternative but to conclude that, given Your Honor's association with Mr. Lang with respect to Breakthrough, Anchorage Sand and Gravel's contribution to Breakthrough, the alleged interest of Anchorage Sand and Gravel in the outcome of the Spendlove case adverse to the interest of Mr. Spendlove, the asserted interest of the Hillside East Community Council in the outcome of the case adverse to the interest of Mr. Spendlove, and Your Honor's participation in the joint efforts of the Community Councils, Breakthrough, and the Muncipality in obtaining All-American City recognition for Anchorage based in part upon shutting down or prohibiting gravel pits, there resulted a situation in which Your Honor's handling of the litigation involving the Spendlove gravel pit raised questions of potential relationships, or the appearance thereof, that would be within the purview of A.S. 22.20.020 and similar promulgations and should therefore have been disclosed to counsel involved in the case. No such disclosure was made.

I must therefore suggest that Your Honor should not participate in any further proceedings in this matter.

Additionally, since the decision of October 3, 1978, postdated the situation discussed above, it appears that this decision should be subject to reconsideration on the merits of another judge. Procedurally I am not sure what the next appropriate step is, and I have no desire to cause embarrassment to any person. It is my hope that this letter, with copies to opposing counsel will result in a just resolution of the situation.

Sincerely,

/s/
John S. Hedland

JSH/rl

cc: Robert Mintz, Esq.
Allen Tesche, Esq.

Supreme Court, U.S.
FILED
AUG 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-37

IN THE

Supreme Court of the United States

October Term, 1985

RODNEY SPENDLOVE and
EMILY SPENDLOVE,
Appellants,

v.

ANCHORAGE MUNICIPAL ZONING
BOARD OF EXAMINERS AND APPEALS
and UPPER DeARMOUN AREA HOMEOWNERS
ASSOCIATION, INC.
Appellees.

**ON APPEAL FROM THE SUPREME COURT
FOR THE STATE OF ALASKA**

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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STATUTES AND RULES OF COURT INVOLVED

UNITED STATES CODE

28 U.S.C. § 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.
>
> For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals. (As amended July 29, 1970, Pub.L. 91-358, Title I, § 172(a)(1), 84 Stat. 590).

ALASKA STATUTES

Alaska Stat. § 22.20.020 (1984) provides:

> *Disqualification of judicial officer for cause*. (a) A judicial officer may not act as such in a court of which the judicial officer is a member in an action in which
>
> (1) the judicial officer is a party or is directly interested;
>
> (2) the judicial officer was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;
>
> (3) the judicial officer is a material witness;

(4) the judicial officer is related to either party by consanguinity or affinity within the third degree;

(5) either party has retained the judicial officer as their attorney or has been professionally counseled by him in any matter within two years preceding the filing of the action;

(6) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

(b) In an action specified in (a) (4) and (5) of this section the disqualification may be waived by the parties and is waived unless a party raises the objection.

(c) If a Judicial officer disqualifies himself or herself or consents to disqualification, the presiding judge of the district shall immediately transfer the action to another judge of that district to which the objections of the parties do not apply or are least applicable and if there is no such judge, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge. (§ 54-2-1 ACLA 1949; am § 1 ch 48 SLA 1967)

ALASKA RULES OF COURT

Appellate Rule 210(e) provides:

Rule 210. *Record on Appeal.*

. . . .

(e) *Statement of Points*. At the time of filing his notice of appeal, the appellant shall serve and file with this designation a concise statement of the points on which he intends to rely on the appeal. The appellate court will consider nothing but the points so stated. On motion in the appellate court, and for cause, the statement of points may be supplemented subsequent to the filing of the designation of record.

. . . .

Appellate Rule 212 provides in relevant part:

Rule 212. *Briefs.*

(a) *Serving and Filing Briefs.*

(1) *Time for Serving and Filing Briefs.* The appellant shall serve and file his brief within 30 days after notice of certification of the record has been served. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 20 days after service of the brief of the appellee. At the time a brief is filed with the appellate court, it must be accompanied by proof of service on all parties.

. . . . .

(c) *Substantive Requirements.*

(1) *Brief of Appellant.* The brief of the appellant shall contain the following items under appropriate headings and in the order here indicated:

. . . . .

[f] A statement of the issues presented for review. . . . .

. . . . .

[h] Argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. . . . .

Appellate Rule 506(a) provides:

Rule 506. Rehearing.

(a) *Grounds for Petition.* The court may order a rehearing of a matter previously decided if, in reaching its decision:

(1) The court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; or

(2) The court has overlooked or misconceived some material fact or proposition of law; or

(3) The court has overlooked or misconceived a material question in the case.

A rehearing will not be granted if it is sought merely for the purpose of obtaining a reargument on the reconsideration of matters which have already been fully considered by the court.

No. 85-37

IN THE

Supreme Court of the United States

October Term, 1985

RODNEY SPENDLOVE and
EMILY SPENDLOVE,
Appellants,

v.

ANCHORAGE MUNICIPAL ZONING
BOARD OF EXAMINERS AND APPEALS
and UPPER DeARMOUN AREA HOMEOWNERS
ASSOCIATION, INC.
Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF ALASKA

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appellee Anchorage Municipal Zoning Board of Examiners and Appeals[1] moves to dismiss the above-entitled appeal or affirm the decision of the Supreme Court of Alaska for the following reasons:

[1]Hereinafter the "Municipality of Anchorage". The Municipality of Anchorage is the unit of local government which established the Anchorage Municipal Zoning Board of Examiners and Appeals pursuant to Anch. Mun. Code 4.40.130.

1. The federal question presented was neither timely raised in, nor considered by the state courts of Alaska.

2. The federal question sought to be reviewed is not substantial.

3. The appeal rests solely on questions of fact decided in the state courts of Alaska.

INTRODUCTION

This appeal is taken from a decision of the Supreme Court of Alaska, *Rodney and Emily Spendlove v. Anchorage Municipal Zoning Board of Examiners and Appeals*, 695 P.2d 1074, *reh'g. denied*, ____P.2d ____, File Nos. 5663, 5680 (Alaska 1985), in which that court affirmed a decision of the Superior Court of the State of Alaska upholding an administrative zoning enforcement order adverse to Appellants. That order forbids Appellants from continuing to operate a gravel mine, as a nonconforming use, within an exclusively residential neighborhood under the zoning ordinance for the Municipality of Anchorage.

This appeal challenges, on federal constitutional grounds, the application of Alaska Stat. § 22.20.020 by the trial court in refusing to recuse himself at the request of Appellants. Federal issues were first raised in Appellants' petition for rehearing before the Supreme Court of Alaska following that court's decision in *Spendlove v. Anchorage Municipal Zoning Board of Examiners and Appeals, 695 P2d. 1074*.

For the reasons set forth below, the Municipality believes this appeal has no merit and should be dismissed, or that this Court should affirm the decision of the Supreme Court of the State of Alaska.

THE PROCEEDINGS BELOW

From an enforcement order issued by the Chief Zoning Inspector for the Municipality of Anchorage limiting Appellants' alleged nonconforming gravel mining operation to a seven and one-half acre tract, the Spendloves appealed to the Anchorage Zoning Board of Examiners and Appeals[2]. Local residents also appealed that decision, claiming Appellants could not lawfully mine gravel on any portion of their property. The Zoning Board, after extensive public hearings, determined that Appellants were not entitled to mine gravel on their property and ordered Appellants to cease such operations altogether. The order

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2Hereinafter "Zoning Board." Zoning Board refers to this body in its role of reviewing zoning decisions.

altogether. The order of the Zoning Board was appealed by Appellants to the State Superior Court.

Approximately six months before trial in Superior court but after rulings on some preliminary motions, Appellants' attorney asked the trial judge, the Honorable James K. Singleton, to recuse himself. This request was not supported by sworn affidavit or oral testimony from Appellants or any other person, but instead consisted only of argument of counsel contained in a letter directed to the trial court on October 12, 1978. That letter is reproduced at page 44 of Appellants' Jurisdictional Statement. Judge Singleton subsequently convened a conference on October 16, 1978, with counsel and obtained the presence of a city official, Mitchell Gravo, knowledgeable in the transactions claimed by Appellants' attorney to support recusal. At that conference, the judge offered his candid recollection of past events, answered questions from counsel, questioned Mr. Gravo and allowed his cross-examination, and heard extensive argument from all attorneys present. Briefs and affidavits of several witnesses were subsequently submitted by the Municipality of Anchorage challenging the factual assertions made in Appellants' letter requesting disqualification of the trial judge. (These materials are contained in Appendices A through E.) After the conference of October 16, 1978, Judge Singleton denied Appellants' request that he be disqualified from hearing the case and, as required by Alaska Statute 22.20.020(c), referred Appellants' request to another judge assigned by the Supreme Court of Alaska for review and decision. On October 19, 1978, Presiding Superior Court Judge Ralph M. Moody conducted a hearing on Appellants' motion to disqualify Judge Singleton and heard extensive arguments of counsel. Judge Moody agreed that Judge Singleton should not have been disqualified, and denied Appellants' motion (Appendix F).

On request of the Spendloves, trial *de novo* was conducted in May and June of 1979 on all claims and counterclaims made by the parties. The Spendloves were represented by counsel throughout those proceedings. The trial court subsequently ruled in favor of the Appellees Municipality of Anchorage and the Upper DeArmoun Homeowner's Association. The court entered an order which requires the Spendloves to cease gravel mining operations, abate environmental hazards, and restore the property in a manner consistent with its residential zoning. Appellants then appealed the decision of the Superior Court to the Supreme Court of Alaska.

Spendloves' appeal and briefs of counsel to the Supreme Court of Alaska challenged the trial court's decision on many grounds not raised here and also challenged, on state grounds only, the decisions of Judges Singleton and Moody regarding the requested disqualification of Judge Singleton.

On March 29, 1985, after receiving an adverse judgment from the Supreme Court of Alaska, *Spendlove v. Anchorage Municipal Zoning Board of Examiners and Appeals*, 695 P.2d 1074, (Alaska 1985), Appellants petitioned that court *pro se* for rehearing. In their petition for rehearing, Appellants raised for the first time the argument that the failure of Judge Singleton to disqualify himself violated their rights under the United States Constitution. Rehearing was denied on April 5, 1985, by the Supreme Court of Alaska, and this appeal to the Supreme Court under 28 U.S.C. § 1257(2) followed.

QUESTIONS PRESENTED

1. Have Appellants failed to raise and litigate a federal constitutional question in the courts of Alaska relating to the disqualification of the trial judge, thereby precluding review of that issue by this Court?
2. Does Spendloves' present appeal a substantial federal question which warrants review by this Court?
3. As the question of whether the state courts erred in refusing to disqualify the trial judge was entirely factual in nature, is review by this Court appropriate?

ARGUMENT

I. THE FEDERAL QUESTION WAS NOT TIMELY RAISED BY APPELLANTS AND WAS NOT CONSIDERED BY THE STATE COURTS BELOW

This Court should not entertain the appeal of Rodney and Emily Spendlove because Appellants failed to raise the federal question in the courts of the State of Alaska before bringing that claim to this Court. Appellants first raised the issue of whether refusal of the trial court to disqualify Judge Singleton violated federal rights in their petition for rehearing before the Alaska Supreme Court. Appellants' dissatisfaction with Judge Singleton was not identified as a federal constitu-

tional issue before the trial court (*see* letter of Appellants' counsel dated October 12, 1978, Appellants' Jurisdictional Statement, Appendix p. 44) It was not so identified in the Spendlove's Statement of Points on Appeal filed with the Alaska Supreme Court (*see* Appendix G), and it was not briefed as such to the Supreme Court of Alaska.

This Court will entertain an appeal from the highest court of a state and decide a federal question raised in that appeal only if that same question was raised and decided in the state courts below. 28 U.S.C. § 1257(2); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439, 22 L.Ed.2d 398, 400-401 (1969); *Wilson v. Cook*, 327 U.S. 474, 479-482, 90 L.Ed 793, 799-800 (1946). Whether the federal question was sufficiently raised in the state courts before appeal may be taken to this Court is determined by resort to law governing practice and procedure in the state courts. A federal question not properly raised in accordance with those state procedures cannot, for the first time, be raised and litigated on appeal to the United States Supreme Court. *Beck v. Washington*, 369 U.S. 541, 549-554, 8 L.Ed.2d 98, 107-109, *reh'g. denied*, 370 U.S. 965, 8 L.Ed.2d 834 (1962); *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 477, 89 L.Ed 1741, 1745 (1945).

Rules of the Alaska Supreme Court require that in order for a question to be properly before that court, the question must be raised in the Statement of Points on Appeal filed with the court, Alaska Rules of Court, Appellate Rule 210(e); *Oceanview Homeowners Association v. Quadrant Construction and Engineering*, 680 P.2d 793, 797 (Alaska 1984); *Moran v. Holman*, 501 P.2d 769, 770 (Alaska 1972); *Myers v. Sill*, 497 P.2d 920, 923 (Alaska 1972), and that the issue be adequately briefed. *Wren v. State*, 577 P.2d 235, 237, n. 2 (Alaska 1978); *Myers, supra; Veal v. Newlin, Inc.*, 367 P.2d 155, 157 (Alaska 1961); Alaska Rules of Court, Appellate Rule 212(c)(1)[f]. The Alaska Supreme Court properly refuses to consider matters which come before it for the first time on a petition for rehearing. *State v. MckCracken*, 520 P.2d 787, 790-791 (Alaska 1973), *reh'g. denied, (1974); Wernberg v. State*, 519 P.2d 801, 804 (Alaska 1974); *Watts v. Seward School Board*, 454 P.2d 732, 737 (Alaska 1969); *cert. denied*, 397 U.S. 921, 25 L.Ed.2d 101 (1970); *Watts v. Seward School Board, 423 P.2d 678, 679 (Alaska 1967), denying reh'g.* 421 P.2d 586 (Alaska 1966), *vacated and remanded on other grounds*, 391 U.S. 592, 20 L.Ed.2d 842 (1968). As the Spendloves failed to raise and litigate the federal constitutional question before the trial court or in full briefing before the Supreme Court of Alaska, that court properly denied their petition for rehearing.

The Spendloves' Jurisdictional Statement candidly admits the federal question brought to this Court was first raised only in connection with their petition for rehearing before the Supreme Court of the State of Alaska. Appellants' Jurisdictional Statement, pp. 2-3. Appellants raised that issue too late, however, because this Court will not assume appellate jurisdiction over questions raised for the first time in a state's highest court on a petition for rehearing. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128, 89 L.Ed 2092, 2099-2100 (1945); *Herndon v. Georgia*, 295 U.S. 441, 443, 79 L.Ed 1530, 1532 (1935), *reh'g denied*, 296 U.S. 661, 80 L.Ed 471 (1936); *Harding v. Illinois*, 196 U.S. 78, 84, 49 L.Ed 394, 396 (1904); *Hanson v. Denckla*, 357 U.S. 235, 244, 21 L.Ed.2d 1283, 1292, *reh'g. denied*, 358 U.S. 858, 3 L.Ed.2d 92 (1958).

An exception to this rule occurs when the state's highest court actually entertained and decided the question. *Radio Station WOW, supra; Herndon, supra*. Here, however, the Alaska Supreme Court did not pass on the due process and equal protection issues as that court denied the Spendloves' petition for rehearing without opinion. "[W]hen . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 581-582, 22 L.Ed.2d 572, 579 (1969); *Exxon v. Eagerton*, 462 U.S. 176, 181, n.3, 76 L.Ed.2d 497, 504, n.3 (1983); *Fuller v. Oregon*, 417 U.S. 40, 50, n.11, 40 L.Ed.2d 642, 653 n. 11 (1974). Appellants here have not made and, indeed, cannot make a showing of proper presentation in the state courts.

Because Appellants failed to raise a federal question relating to the disqualification of Judge Singleton before the courts of the State of Alaska, this court should decline to consider the merits of this appeal.

II. THE SPENDLOVES' APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Even if the factual allegations made by Appellants in this appeal[3] are true, a substantial federal question that warrants review by this Court has not been presented.

---

[3]As noted *supra*, the Municipality challenged Spendlove's factual allegations with testimony and sworn affidavits presented to Judges Singleton and Moody in response to the Spendloves' motion to disqualify Judge Singleton, and in no way concedes the truth of Spendloves' allegations.

Although Appellants claim the trial judge served as vice-chairman of a non-profit civic organization whose program included restricting gravel operations such as that operated by Appellants, the record totally lacks any claim or proof indicating that Judge Singleton had any substantial personal and pecuniary stake in the outcome of this case, or that Judge Singleton acted in a biased or improper manner. In addressing the question of whether a challenge to the qualification of a state judicial officer involves substantial federal questions, this Court wrote:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. *Wheeling v. Black*, 25 W. Va., 266, 270. But it generally violates the Fourteenth Amendment and deprives the defendant in a criminal case of due process of law to subject his liberty or property to a judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

Tumey v. State of Ohio, 273 U.S. 510, 523, 71 L.Ed 749, 754 (1927).

The most comprehensive statement of Appellants' challenge of Judge Singleton is set forth in a letter sent by Appellants' attorney on October 12, 1978 to the trial court. Appellants' Jurisdictional Statement, Appendix p. 44. The allegations in that letter support only the proposition that Judge Singleton was vice-chairman of a non-profit organization which sought recognition for Anchorage as an All-America city by closing down Appellants' gravel pit and that the non-profit organization received funds from a business competitor of the Spendloves. That letter, and Appellants' other unsupported allegations fall far short of showing or even alleging that the trial judge had any direct, personal or pecuniary stake in the outcome of this litigation.

Matters of judicial qualification in general and questions of judicial bias in particular are best left to the states. *Tumey v. Ohio, supra.* Alaska, like other states, has enacted a statute setting forth grounds for disqualification of judicial officers. Alaska Stat. § 22.20.020 required an initial determination by Judge Singleton as to whether he could hear the case. As noted *supra*, that determination was made only after an extensive hearing at which counsel for all parties participated, were given an opportunity to ask questions of the judge, presented their own evidence and questioned the city official who was most

knowledgeable about the transactions in question. Furthermore, as required by Alaska Stat. § 22.20.020, Appellants' motion was subsequently referred to another judge assigned by the Supreme Court for review after Judge Singleton's decision not to recuse himself. At the second hearing, before Judge Moody, attorneys for all parties were again given opportunities to argue their respective positions. The question of Judge Singleton's qualifications to hear this case was litigated vigorously in the state courts of Alaska and ultimately decided adversely to Appellants. This question, however, is not a federal question. It should remain in the state courts of Alaska.

III. THIS COURT SHOULD NOT REVIEW THE SPENDLOVES' APPEAL AS THE APPEAL RESTS SOLELY ON QUESTIONS OF FACT DECIDED BY THE STATE COURTS OF ALASKA

Appellants ask this Court to reweigh facts offered to the trial court and to make its own determination as to whether sufficient factual grounds have been shown by Appellants to require disqualification of the trial judge under Alaska Stat. § 22.20.020. As this Court is requested by Appellants to reweigh facts submitted to the trial court and second-guess the trial court's application of a state statute on factual grounds, review is inappropriate.

The letter of the Spendloves' attorney of October 12, 1978 sought disqualification of the trial judge based on a number of unproven and unsupported factual allegations which were subsequently repeated in the oral argument before Judge Singleton and later Judge Moody. Those allegations were squarely contradicted by sworn affidavits offered by the Municipality of Anchorage (*see* Affidavits of Mitchell Gravo, Jerry Wertzbaugher and Joe Stimson, Appendices C, D and E respectively), by testimony of Mitchell Gravo given at a hearing conducted on October 16, 1978, and by comments made by Judge Singleton himself during that hearing. Nor did Appellants offer any evidence to support their allegations. Appellants' subsequent appeal to the Alaska Supreme Court argued that the facts alleged by Appellants supported disqualification of Judge Singleton and that Judges Singleton and Moody erred in denying Appellants' motion to disqualify Judge Singleton. Treatment of this question, therefore, at both the trial court level and by the parties on briefing to the Supreme Court of Alaska was entirely on issues of fact and interpretation of evidence offered by all parties in support of their positions.

This Court is reluctant to entertain appeals taken from decisions of state courts which rest, as in this case, entirely on factual grounds litigated by the parties in the state courts. Review by this Court of decisions of state courts resting on questions of fact is not within the jurisdiction of this Court. *See, Dower v. Richards,* 151 U.S. 658, 38 L.Ed 305 (1894); *Chemical National Bank of Chicago v. City of Portage,* 160 U.S. 646, 40 L.Ed 568, (1896); and *Kansas City Southern Railway Co. v. C.H. Albers Commission Co.,* 223 U.S. 573, 56 L.Ed.2d 556 (1912).

The Spendloves' initial motion to disqualify Judge Singleton and their appeal to the Supreme Court of Alaska relied solely on unsupported factual allegations made by their attorney which were contested by affidavits and testimony offered by the Municipality. Unlike the facts in *Kansas City Southern Railway Co. v. Albers supra.* those questions of fact are not so involved with or dependent on questions of federal law as to require examination of the entire factual record by this Court. The affidavits submitted by the Municipality in opposition to Appellants' motion, together with testimony of Mitchell Gravo given during the hearing conducted on October 16, 1978 by Judge Singleton underscore the factual nature of the controversy then before the court, and plainly demonstrate the existence of an ample evidentiary basis for the trial court's refusal to disqualify itself under Alaska Stat. § 22.20.020. Absent a showing of exceptional circumstances (which has not been made by Appellants) this Court will not reject or otherwise disturb factual determinations of lower state courts where supported by an evidentiary foundation. *Fry Roofing Co. v. Wood,* 344 U.S. 157, 97 L.Ed 168 (1952), *reh'g. denied,* 345 U.S. 913, 97 L.Ed. 1237 (1953); *Evco v. Franklin Jones,* 459 U.S. 91, 34 L.Ed.2d 325 (1972); *California Liquor Dealers v. Mid-Cal Aluminum,* 445 U.S. 97, 63 L.Ed.2d 233 (1980).

As Appellants' motion to disqualify the trial court was litigated before the courts of Alaska on factual rather than legal grounds, and because the decisions of the trial court were supported by a substantial evidentiary foundation of affidavits and testimony offered in opposition to that motion, this Court should not reweigh the evidence or redecide the factual questions litigated.

CONCLUSION

For all the foregoing reasons, this appeal should be dismissed, or, alternatively the decision of the Supreme Court of Alaska should be affirmed.

Respectfully submitted, this 14 day of August, 1985.

ANCHORAGE MUNICIPAL
ZONING BOARD OF
EXAMINERS AND APPEALS

By: /s/
Gary C. Tucker*
Assistant Municipal Attorney

By: /s/
Allen E. Tesche
Deputy Municipal Attorney

**Counsel of Record*

APPENDICES

APPENDIX A

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

RODNEY SPENDLOVE,	)
Appellant,	)
vs.	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS,	)
Appellee.	)

No. 3AN-78-3303 CIV.

MEMORANDUM IN OPPOSITION TO APPLICATION FOR DISQUALIFICATION OF JUDGE

STATEMENT OF FACTS

This matter is an appeal from a decision of the Anchorage Municipal Zoning Board of Examiners and Appeals, dated March 30, 1978, who ordered Rodney Spendlove to refrain from using his Hillside property for gravel extraction operations. In addition to this appeal, Mr. Spendlove also filed a separate action in Superior Court seeking an injunction against enforcement of the Board's Order. The two cases have never been consolidated although they raise identical legal and factual issues. The injunction matter, captioned *Rodney and Emily Spendlove v. Municipality of Anchorage*, (3AN-78-2860 CIV.) remains assigned to the Honorable Mark C. Rowland. The administrative appeal, captioned as *Splendlove v. Anchorage Municipal Zoning Board of Examiners and Appeals*, [3AN-78-3303 CIV.], is assigned to the Honorable James K. Singleton.

In challenging the Board's order, Mr. Spendlove first sought a preliminary injunction from Judge Rowland in *Spendlove v. Municipality*. After extensive briefing and oral argument, Judge Rowland denied Spendlove's motion for preliminary injunction on July 13, 1978.

Spendlove then sought an order shortening time on July 19, 1978, from Judge Singleton, on what was previously a motion for preliminary injunction, in Civil Action 3AN-78-2860, but later restyled as an application for stay in the administrative appeal assigned to Judge Singleton, 3AN-78-3303. Judge Singleton heard oral argument from the parties on August 10 and 11, 1978, and received extensive briefing. On October 3, 1978, Judge Singleton issued a written opinion which denied Spendlove's application for stay pending this administrative appeal.

Counsel for Mr. Spendlove then, on October 12, 1978, requested that Judge Singleton disqualify himself from further proceedings in *Spendlove v. Anchorage Municipal Zoning Board,* (3AN-78-3303), and that his application for stay be reopened before another judge. On October 16, 1978, Judge Singleton declined to disqualify himself for cause and, pursuant to AS 22.20.020(c) this matter has been assigned to the Honorable Ralph Moody for hearing on whether Judge Singleton should be disqualified.

APPELLANT HAS NOT DEMONSTRATED SUFFICIENT GROUNDS TO DISQUALIFY JUDGE SINGLETON

AS 22.20.020 provides in pertinent part:

> . . . A judicial officer may not act as such in a court of which he is a member in any action in which. . .
>
> (6) The judicial officer feels that, for any reason, he cannot give a fair and impartial decision . . .

While a matter of this kind rests with the sound discretion of the judge to whom the application for disqualification is first made, Superior Court Judges should not lightly disqualify themselves from cases they are assigned. Our Supreme Court has indicated that "a [Superior Court Judge] should do so *only for the most compelling reasons*". *Nelson v. Fitzgerald,* 403 P.2d 667, 679, (Alaska 1965), emphasis added. Moreover, the Supreme Court requires judges who disqualify themselves to set forth the specific reasons for the disqualification in writing to the presiding judge. [Supreme Court Order 315, August 1, 1978.]

The kind of bias which must be shown before disqualification is proper is not a judicial predisposition on the merits of the case or the subject matter of the litigation, but rather "a hostile feeling or spirit of ill will — or undue friendship or favoritism, towards one of the

litigants." *In Re Guardianship of Styer*, 536 P.2d 717 (Ariz. App. 1975) [appeal from decision surcharging guardian of estate]. In a criminal prosecution arising from a realty sale transaction, wherein the trial judge was challenged for cause because the judge was familiar with certain real estate transactions, the Supreme Court of Arizona wrote:

> . . . even if the trial judge were biased in favor of escrowing such transactions through title companies he would not be disqualified as a matter of law. For it is generally held that "bias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case."

State v. Mills, 370 P.2d 946 (Ariz. 1962) citing 30A Am.Jur. 171. See also, *People v. McCullough*, 223 P.2d 37 (Cal. App. 1950) [attempted disqualification of judge following trial of eminent domain action denied.] Finally our own Supreme Court, in a disciplinary proceeding involving an Anchorage attorney, disclaimed hostile feelings or ill will towards the respondent and refused to disqualify itself saying:

> As to the respondent's assertion that this court is objectively disqualified to give him a fair and impartial hearing because it is biased or prejudiced against him on account of his participation in the pending federal court case mentioned earlier, we disclaim any such hostile feeling or spirit of ill will towards the respondent as would render us unfit to judge his case. The fact that we may have an opinion as to the merits of the case or how it should be decided different from that of the respondent is not enough to make us biased or prejudiced.

In Re MacKay, 416 P.2d 823 (Alaska 1964).

Mr. Hedland asks us to infer that because Judge Singleton is a representative of Breakthrough[1] helped the Municipal Manager's Office in preparing part of an All American City application which application also contains a reference to activities of neighborhood community councils in "prohibiting gravel pit operations in certain areas" that Judge Singleton must be personally biased against Mr. Spendlove or in favor of appelee. A review of the remarks made by Judge Singleton in chambers on October 16, 1978, and the attached affidavits indicates that Spendlove's fears are pure illusion.

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[1]A fact counsel for Mr. Spendlove readily admits he knew at "all pertinent times". Letter of John Hedland to the Honorable James K. Singleton dated October 12, 1978, p. 3.

Judge Singleton is not a member of the Hillside East Community Council, or for that matter, any community council. He does not recall ever meeting with or discussing matters relating to community councils, or Breakthrough with the executive director of the Federation of Community Councils, Ms. Jean Buchanan, who prepared the Community Councils' portion of the All American City application.

The judge *did* receive a blank "All American City" application from Mitch Gravo, special assistant to the Municipal Manager, and was asked to supply information for that application relating solely to Breakthrough. The Judge and Mr. Gravo did not discuss community councils, gravel pits or this litigation, and does not recall even seeing or signing the final application. Mr. Gravo's affidavit indicates he never spoke with the Judge about gravel pits, pending litigation concerning gravel pits, or any of the material that was included in the application. [Affidavit of Mitch Gravo, p. 2.] Neither Mr. Gravo nor Judge Singleton have any recollection that the Judge was ever aware of the full content of the portion of the All American City application relating to community councils until after that application was submitted. [See Mitch Gravo's statements on page 3 of his affidavit.]

The All American City application itself [attached to the affidavit of Mitch Gravo] does not, contrary to Mr. Hedland's assertions, refer to Mr. Spendlove's gravel pit. The final application [attached as Exhibit A to the Gravo affidavit] refers only to the 28 community councils in general, whose activities include "prohibiting gravel operations in certain areas" and does not specify *which* community council or gravel pits are involved. An earlier draft of the application [attached as Exhibit B to the Gravo affidavit] recites only that the Hillside East Community Council had "closed down gravel pit operation [sic] in their area which most members found offensive." *Which* gravel pit we will never know, because contrary to Mr. Hedland's argument, there have been at least three other occasions on which Hillside residents and members of the Hillside East Community Council have sought prohibition of gravel operations in that area. Writes the Municipality's Chief Zoning Inspector:

> In addition to the Spendlove matter, I recall at least three other occasions in which Hillside residents and member of the Hillside East Community Council have contacted my office regarding cessation of illegal gravel operations in their neighborhood. Specifically, I recall:

a. Kasilof Hills, Summer, 1977, illegal removal of gravel in commercial quantities from residential subdivision.

b. Rockhill Gravel Pit, summer, 1977, complaints by residents regarding enforcement of terms and conditions of special exception for mineral resource operation.

c. Nettleton Subdivision, Summer, 1978, illegal mineral resource extraction operation in residential neighborhood.

The Spendlove matter is only one of a series of incidents brought to my attention by residents of the Hillside area and members of the Hillside East Community Council in which those persons have expressed a desire to seek the prohibition of gravel extraction operations in their community.

[Affidavit of Joe Stimson, p. 2.]

The factual record simply indicates that Judge Singleton was asked by the Manager's assistant to provide information about Breakthrough for the application for All American City Designation, but that he did *not* participate in drafting or was even aware that some drafts of the application made vague reference to gravel pits. The Judge told counsel for all parties on October 16, 1978, that he harbored no ill will or prejudice toward Mr. Spendlove or favoritism to the appellee and felt qualified to continue with the assignment. Given the Judge's forthright statements regarding his ability to hear this matter without bias toward any party, and the total lack of hard facts supporting bias, there is no "compelling reason" within the meaning of *Nelson v. Fitzgerald, supra,* to reassign the Spendlove matter to a third Superior Court Judge for relitigation of issues already decided by Judges Rowland and Singleton.

For the above reasons, the Municipality respectfully requests that Judge Singleton not be disqualified from this matter.

DATED this 17th day of October, 1978.

THEODORE D. BERNS
Municipal Attorney

By: /s/
Allen E. Tesche
Deputy Municipal Attorney

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

RODNEY SPENDLOVE,	)
Appellant,	)
vs.	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS,	)
Appellee.	)

No. 3AN-78-3303 Civ.

COMMENTS FILED PURSUANT TO LEAVE OF COURT GRANTED OCTOBER 19, 1978

I
JUDGE SINGLETON SHOULD NOT BE DISQUALIFIED.

The primary issue raised by Mr. Hedland is whether Judge Singleton was biased. The only purported evidence offered by Mr. Hedland on this issue is contained in the affidavit of John Hedland, dated October 17, 1978. In paragraph 5, Mr. Hedland reveals that the substance of his allegtion of bias is based upon Judge Singleton's alleged review of the final All-American City application. That application does not specifically refer to either the Spendlove gravel pit in issue in the case at bar or the Hillside East Community Council. Rather, the application only refers to the shutting down of gravel pits, generally, as one of numerous accomplishments of community councils in general. The only evidence that Judge Singleton ever even saw the final All-American City application is Mr. Hedland's assertion that Mr. Gravo told Mr. Hedland that Judge Singleton had reviewed the final draft of the application. First, Mr. Heldand's affidavit is not admissible as proof

of the fact that Judge Singleton saw the final draft application because Mr. Hedland's testimony respecting that which Mr. Gravo purportedly said is heresay. Also, Mr. Hedland's affidavit is directly contradicted by the sworn testimony of Mr. Gravo himself. In his affidavit dated October 16, 1978, at the top of page 3, Mr. Gravo states that:

> "the final All-American City application was not forwarded to Judge Singleton for review."

Judge Singleton himself, in an one-the-record in-chambers conference with counsel, said that he couldn't remember seeing the final application, but if he did, he only reviewed it in order to be sure that the Breakthrough volunteers' names were correctly spelled. Accordingly, there is no evidence that Judge Singleton ever saw the final All-America City application. Even if he did, there is no evidence that Judge Singleton ever saw that part of the application which mentioned gravel pits. Even if he did, there is no evidence that Judge Singleton knew that the vague reference contained in the application had any connection with the gravel pit at issue in the case at bar. Judge Singleton has twice reviewed Mr. Hedland's allegations and affidavits, and has twice decided not to disqualify himself. Judge Singleton's decision should not lightly be put aside. Mr. Hedland's request for a disqualification should be denied.

II
MR. HEDLAND'S AFFIDAVITS SHOULD BE STRICKEN.

The affidavits filed by John Hedland on October 17, 1978, and October 19, 1978, are not made from personal knowledge and are heresay respecting the issues of whether Judge Singleton saw the final draft All-America City application and what the vague reference to gravel pits contained in that application meant. Further, by submitting affidavits respecting contested matter, Mr. Hedland appears to be in danger of violating disciplinary Rule 5-102(a). Accordingly, Mr. Hedland's affidavits should be stricken and not considered by the court.

III.
THE ISSUE OF JUDGE SINGLETON'S DISQUALIFICATION IS NOT FORMALLY BEFORE THE COURT.

Rule 77(b)(2), Alaska Rules of Civil Procedure, provides:

> There shall be filed with the motion . . . a brief, complete state-

ment of the reasons in support of the motion, which shall include a memorandum of the points and auhorities upon which the moving party will rely elipsus.

Mr. Hedland submitted a letter, not a motion. The letter contains no citation of points and authorities upon which Mr. Hedland relies in requesting the extraordinary relief sought. The allegations contained in the letter are not supported by any evidenciary [sic] material whatsoever. In fact, Mr. Hedland's letter contains numerous misstatements of fact and wholly unfounded allegations. Since Mr. Hedland is apparently unable to cite any points and authorities in support of his allegation of judicial misconduct and request for relief, and since Mr. Hedland is apparently unable to present admissable evidence in support of his allegations, Mr. Hedland's request for disqualification should be summarily denied.

DATED at Anchorage, Alaska this 20th day of October, 1978.

BURR, PEASE & KURTZ, INC.
Attorneys for Upper
De Armoun Area
Homeowners Association, Inc.

By /s/
Robert A. Mintz

APPENDIX C

IN THE DISTRICT [sic] COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

RODNEY SPENDLOVE,	)
Appellant,	)
vs.	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS,	)
Appellee.	)

No. 3AN-78-3303 Civil

AFFIDAVIT OF MITCHELL D. GRAVO

Mitchell D. Gravo being first duly sworn, deposes and says; [sic]

1. I am employed as the Administrative Assistant to the Municipal Manager of Anchorage and have been so employed since March 13, 1978. I was responsible for coordinating the preparation of the Municipality of Anchorage's application for an All-America City Award which was submitted to the National Municipal League on September 5, 1978. In coordinating that application, I performed the following:

(a) I contacted Ms. Jean Buchanan, Director of the Federation of Community Councils, and explained the All-America City application to her. The Federation of Community Councils is the governing body for the 28 existing Community Councils in the Municipality of Anchorage. As the governing body of these 28 Community Councils, the Federation represents the interests of all the councils throughout the Municipality. And in her role as Director of Community Councils, Ms. Buchanan represents the interests of all 28 Community Councils throughout the Municipality. I chose Ms. Buchanan as my contact with Community Councils because I believed she was one of the few people

in our community who had a broad overview of the activities of the 28 Community Councils. I then asked if she would study the application and prepare the Community Councils' story for the application. She agreed to this request and I then forwarded a copy of the application to her for completion. Ms. Buchannan's work on the application was limited to her area of expertise, Community Councils.

(b) I contacted Sharon Snelling, Executive Director of Breakthrough, a broad-based citizen effort identifying Anchorage's problems, and working to resolve them, and explained the All-America City application to her.

She indicated Judge James K. Singleton, Vice-Chairman of Breakthrough, was the person in their organization most knowledgeable about their programs. I contacted Judge Singleton and explained the All-America City application to him. I then asked if he would study the application and prepare the Breakthrough story for the application. He agreed to this request, and I then forwarded a copy of the application to him for completion. To the best of my knowledge, Judge Singleton is not involved in the Federation of Community Councils, and I asked him to work solely on the Breakthrough section of the application. I never asked him any questions concerning Community Council activity in our community.

(c) Ms. Buchanan and Judge Singleton then prepared their respective material on Community Councils and Breakthrough. They reviewed only their respective material and then forwarded it to me. When I received their material, I edited and combined the material into a single application. During this editing process, I had several questions which were directed to the Community Council office, Ms. Buchanan, the Breakthrough Office, and Judge Singleton. Questions concerning Community Councils were directed to the Community Council Office or Ms. Buchanan, and questions concerning Breakthrough were directed to the Breakthrough Office or Judge Singleton. Contrary to what Mr. Hedland indicates on Page 4 of his letter of October 12, 1978 to Judge Singleton, I did not meet with Judge Singleton and Jean Buchanan as a group, but dealt separately with Breakthrough and Community Councils concerning their individual contributions to the application. Throughout the editing process, I never met together with Ms. Buchanan and Judge Singleton.

(d) My discussions with Judge Singleton were limited to Breakthrough. Judge Singleton and I never discussed the matters relating to

the material Ms. Buchanan prepared for me. I initially contacted Judge Singleton solely because he was an expert on Breakthrough, not Community Councils. I had a preliminary discussion with Judge Singleton as referred to in paragraph b) above and to the best of my recollection I made one or two phone calls to Judge Singleton concerning the material that he presented to me on Breakthrough. Judge Singleton and I never discussed gravel pits, or pending litigation concerning gravel pits, and we did not discuss any of the Community Council material that was included in the application.

(e) The final All-America City application was reviewed by myself, Douglas G. Weiford, Municipal Manager, Beverly Isenson, Public Information Officer, and Ms. Jean Buchanan. The final All-America City application was not forwarded to Judge Singleton for review.

2. To the best of my knowledge, Judge Singleton had no knowledge of or involvement in the Community Council segment of our All-America City application, and did not have any reason to know what was contained in that portion of our application.

3. The attached documents, labeled exhibits *A-K, [documents not attached here]* are true and correct copies of the working papers, draft application and final application documents prepared by me in connection with the Municipality's application to the National Municipal League for designation as an All-America City.

Further your affiant saith not.

/s/_____
Mitchell D. Gravo

SUBSCRIBED AND SWORN to before me this 16 day of October, 1978.

/s/_____
Notary Public in and for Alaska
My commission expires: 11-26-81

APPENDIX D

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

RODNEY SPENDLOVE,	)
Appellant,	)
vs.	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS,	)
Appellee.	)

No. 3AN-78-3303 CIV.

AFFIDAVIT OF JERRY WERTZBAUGHER

STATE OF ALASKA)
)ss:
THIRD JUDICIAL DISTRICT)

JERRY WERTZBAUGHER, being first duly sworn, on oath, deposes and says:

1. I am an attorney employed by the Municipality of Anchorage. I am assigned to the Civil Division of the Office of the Municipal Attorney, and in that capacity my duties include the representation of the Municipality in general civil litigation.

2. In the course of my employment as set forth above, I have had the occasion to represent the Municipality in the cases of *Rodney and Emily Spendlove v. Municipality of Anchorage,* No. 3AN-78-2860 and *Rodney Spendlove v. Anchorage Municipal Zoning Board of Examiners and Appeals,* No. 3AN-78-3303. My representation in the referenced cases has included the drafting and filing of briefs, appearances at bar, discovery proceedings and communications and consultations with all counsel of record.

3. The two referenced cases stem from the same factual circumstance and involves similar if not common issues of law although they have been assigned to separate divisions of the Superior Court. On the basis of that circumstance, I have on several occasions (more than 3) discussed with Mr. John Hedland, counsel for Rodney Spendlove, the issue of whether Case No. 3AN-78-3303 should be assigned to the Honorable James K. Singleton. On each of the occasions I have discussed the matter with Mr. Hedland, he has informed me that he had no objection to the said case being heard and determined by Judge Singleton, nor any objection to Case No. 3AN-78-2860 being reassigned to Judge Singleton.

4. On August 1, 1978, I represented the Municipality of Anchorage in an informal conference between myself, Mr. Hedland, and Mr. Robert Mintz in the chambers of the Honorable James K. Singleton. During the course of the said conference and in the presence of all counsel, it was suggested by Judge Singleton that Case No. 3AN-78-3303 be reassigned to the Honorable Mark W. Rowland because of a contention of the Municipality that pending proceedings in Case No. 3AN-78-3303 had been previously disposed of by Judge Rowland in Case No. 3AN-78-2860. Judge Singleton, in the presence of all counsel, spoke with Judge Rowland by telephone and discussed with him the reassignment of Case No. 3AN-78-3303 to Judge Rowland. Following that discussion, and in the presence of all counsel, Judge Singleton stated that he would retain case No. 3AN-78-3303 unless objection was raised by any of the parties present. There being no objection raised to Judge Singleton's continued handling of the case, the scope and timing of further proceedings was discussed and the meeting was thereafter adjourned.

5. On the basis of my personal observations and knowledge, I am aware that Mr. Hedland had at least four, and possibly more, opportunities to inform counsel for the Municipality of any objection to the assignment of Case No. 3AN-78-3303 to the Honorable James K. Singleton prior to Judge Singleton's consideration of the merits of said case. On each of those occasions Mr. Hedland either failed to inform the Municipality of any objections or indicated affirmatively that he was in agreement with the assignment. I remain unaware of any objection raised by Mr. Hedland to the assignment of the case to Judge Singleton until after the issuance of a ruling on the merits of the case adverse to the interests of Mr. Spendlove.

Further your affiant sayeth naught.

/s/
Jerry Wertzbaugher

SUBSCRIBED AND SWORN to before me, this 6th day of October, 1978.

/s/
Notary Public in and for Alaska
My Commission Expires: 12-4-80

APPENDIX E

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

RODNEY SPENDLOVE,	)
Appellant,	)
vs.	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS,	)
Appellee.	)

No. 3AN-78-3303 CIV.

AFFIDAVIT OF JOE STIMSON

JOE STIMSON, being first duly sworn, on oath, deposes and says:

1. I am currently employed by the Municipality of Anchorage and have been so employed by the Municipality since September 15, 1975. As Chief Zoning Inspector, my duties include the investigation of citizens' complaints relating to alleged zoning violations, inspection of land uses, presentation of appeals cases before the Zoning Board of Examiners & Appeals, representation of the Department of Public Works before the Municipal Planning & Zoning Commission, and similar activities relating to the enforcement of the zoning ordinance and land use regulations. As Chief Zoning Inspector, I am usually the first person in the Municipality to whom private citizens concerned about alleged zoning violations turn and register complaints about those violations. I am personally involved in virtually every investigation and action taken by the Municipality of alleged zoning violations.

2. As Chief Zoning Inspector, I have been contacted on numerous occasions by Hillside residents and persons representing or associated with the Hillside East Community Council concerning prohibition of gravel pit operations in the Hillside area. At their request, I have investigated these alleged violations and have sought administrative or

legal relief for prohibition of illegal gravel pit operations in that area. In addition t the Spendlove matter, I recall at least three other occasions in which Hillside residents and members of the Hillside East Community council have contacted my office regarding cessation of illegal gravel operations in their neighborhood. Specifically, I recall:

a. Kasilof Hills, Summer, 1977, illegal removal of gravel in commercial quantities from residential subdivision.

b. Rockhill Gravel Pit, summer, 1977, complaints by residents regarding enforcement of terms and conditions of special exception for mineral resource operation.

c. Nettleton Subdivision, Summer, 1978, illegal mineral resource extraction operation in residential neighborhood.

The Spendlove matter is only one of a series of incidents brought to my attention by residents of the Hillside area and members of the Hillside East Community Council in which those persons have expressed a desire to seek the prohibition of gravel extraction operations in their community. The Spendlove matter, therefore, was not the first, and regretably will not be the last gravel pit problem zoning inspectors for this Municipality will face.

Further your affiant sayeth naught.

/s/ _____

Joe Stimson

SUBSCRIBED AND SWORN to before me, this 16th day of October, 1978.

/s/ _____

Notary Public in and for Alaska
My Commission Expires: 12-4-80

APPENDIX F

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RODNEY SPENDLOVE,
Appellant,
vs.
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS,
Appellee.

No. 3AN-78-3303 Civil

ORDER DENYING DISQUALIFICATION FOR CAUSE

The Chief Justice has appointed the undersigned to hear the disqualification for cause of the Honorable James Singleton.

This court, having heard oral argument and considered the affidavits filed by counsel, finds no basis for the disqualification of Judge Singleton and, therefore,

IT IS ORDERED that the disqualification for cause of Judge Singleton is denied.

DONE at Anchorage, Alaska, this 24th day of October, 1978.

/s/
Ralph E. Moody, Presiding
Superior Court Judge

I certify that on 10-25-78, a copy of the above Order was forwarded to the following at their addresses of record:

Allen Tesche, Esq.
Robert Mintz, Esq.
John S. Hedland, Esq.

/s/
Secretary to Judge Moody

APPENDIX G

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

RODNEY SPENDLOVE and EMILY SPENDLOVE,	)
Appellants,	)
v.	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS and UPPER DeARMOUN AREA HOMEOWNERS ASSOCIATION, INC.,	)
Appellees.	)

CASE No. 3AN-78-3303 Civil

STATEMENT OF POINTS ON APPEAL

RODNEY SPENDLOVE and EMILY SPENDLOVE, appellants from the Final Judgment of this Court in this case, state that they intend to rely on the following points in the appeal:

1. That the court erred in failing to reverse the Board of Appeals' ruling that appellants had lost their grandfather rights in 1969.

2. That the court erred in finding that the appellants did not have grandfather rights at any time.

3. That the court erred in finding that appellants did not intend to use their property as a gravel pit, since the overwhelming weight of evidence established that appellants did in fact intend to use their property for gravel pit purposes.

4. That the court erred in holding that the small amount of usage in years prior to 1978 was evidence of non-gravel pit activity.

5. That the court erred in permitting the Upper DeArmoun Area Homeowners Association, Inc., to intervene in the case, since this

organization was non-existent at the time of the proceedings before the Municipal Administrative Boards.

6. That the court erred in failing to keep Hugh Gellert in as a party in the Superior Court in that the appeal to the Anchorage Municipal Zoning Board of Examiners and Appeals was by Hugh Gellert, and not the Upper DeArmoun Area Homeowners Association, [sic].

7. That the court erred in failing to limit the trial *de novo* to issues arising after 1969.

8. That the court erred in refusing to proceed with a jury trial herein when demanded by plaintiffs.

9. That the court erred in holding that appellants did not intend to use their property as a gravel pit because they planned to subdivide it, since the property being used for the gravel pit was not subdivided.

10. That the court erred in failing to hold that the Board of Examiners and Appeals did not have jurisdiction.

11. That the court erred in failing to find that there was not an enforcement order appealable to the Board of Examiners [sic] and Appeals of the Anchorage Municipal Zoning Board of Examiners' Appeals, when the appeal was first taken by Hugh Gellert, and the Board of Examiners' Appeals [sic] had no jurisdiction.

12. That the court erred in refusing to disqualify himself, when requested, upon the ground that he had been co-chairman of an Anchorage Commission, which commission had represented itself publicly as having accomplished the shutting down of appellants' gravel pit, prior to the trial herein.

13. That the court erred by not ruling on the extent or amount of activity which would be necessary for the continued existence of a mineral or natural resource extraction or operation under grandfather rights.

Dated at Anchorage, Alaska, this 23rd day of January, 1981.

/s/_____
Rodney Spendlove, pro per

/s/_____
Emily Spendlove, pro per
P.O. Box 144
Anchorage, Alaska 99510
Tel: 274-7775

Supreme Court, U.S.
FILED
AUG 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-37 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

RODNEY AND EMILY SPENDLOVE,

APPELLANTS,

V.

ANCHORAGE MUNICIPAL ZONING
BOARD OF EXAMINERS AND APPEALS,
AND UPPER DE ARMOUN AREA HOMEOWNERS
ASSOCIATION INC.,

APPELLEES.

ON APPEAL FROM THE ALASKA SUPREME COURT

OPPOSITION TO MOTION TO DISMISS

RODNEY AND EMILY SPENDLOVE
P.O. BOX 144
ANCHORAGE, ALASKA 99510

BEST AVAILABLE COPY

NO. 85-37

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

RODNEY AND EMILY SPENDLOVE,

APPELLANTS,

V.

ANCHORAGE MUNICIPAL ZONING
BOARD OF EXAMINERS AND APPEALS,
AND UPPER DE ARMOUN AREA HOMEOWNERS
ASSOCIATION INC.,

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ON APPEAL FROM THE ALASKA SUPREME COURT

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SUMMARY OF ARGUMENT

The record truely reflects that the federal question of denial of due process for failure of the state judge to recuse himself; was timely presented to the state supreme court on appeal; and the challenge to the Constitutionality of the state recusal statute was filed in the petition for rehearing; after the state supreme court ignored the issue. Defendants admit to the timeliness in the Motion to Dismiss.

In the matrix of the factual arguments by both sides to this appeal, a salient picture emerges of what a reasonable person could only conclude as an 'appearance of bias.'

Both sides have painted a picture of turmoil and contention that by its very existence draws of one conclusion; that there is a strong appearance of bias and prejudice; an appearance so strong as to compel

a conclusion of actual bias and prejudice in fact.

A judge sits on a committee that is in the vanguard of shutting down the plaintiff's gravel pit: the judge's committee is financed by the parties to this case; and the municipality, a party here, is organizing a municipal bonding effort for the judge's committee; the success of the bonding directly related to the All-American City application given final review by the judge; an application specifically focusing on the eradication of plaintiff's gravel pit!

STATEMENT OF FACTS: TO CORRECT DEFENDANTS' MISREPRESENTATIONS

1. The Defendants Fianaced The Organization The Judge Was Vice-Chariman Of

At the 16 October,1978 in-chambers hearing, the state judge admitted that his organization, 'Breakthrough,' was working

with the Municipality of Anchorage on a municipal bond proposal to finance Breakthrough. [TR.,pp.526-527]

The Municipality is a party to this action.

As pointed out in the Jurisdictional Statement, the other financing for Breakthrough was coming from the other party to this case:

1) Herb Lang, president of Alaska Sand and Gravel, was a member of the Steering Committee of Breakthrough;

2) Mr. Gellert, majority owner of Alaska Sand and Gravel, was a cross-appellant in the state court;

3) Alaska Sand and Gravel was the major fianacial contributor to Breakthrough. [Jurisdictional Statementppp.7-12]

Both parties defendant were financing the judge's committee; and were actively involved with the judge in his committee.

2. The All-American City Application Was Contingent On The Municipal Breakthrough Bonds Issue

The evidence revealed that there was a connection between the success of the municipal bond issue for 'Breakthrough,' and the All-American City application. [TR.,551-577]

3. The All-American City Application Reviewed By The Judge: Specifically Referred To Mr. Spendlove's Gravel Pit; The Gravel Pit That Is The Subject Matter of This Case

Affidavits and testimony submitted at the recusal hearing on 19 October,1978, attest to the facts that:

1) Jean Buchanan, director of the Anchorage Federation of Community Councils, prepared the All-American City application;

2) Spendlove's gravel pit was the focus of the All-American City application as an example of community council activism; an activism participated in by the judge's committee, Breakthrough;

3) Jean Buchanan specifically referred to Mr. Spendlove's gravel pit in the application;

4) the judge, as vice-chairman of Breakthrough, reviewed the application with its direct reference to Spendlove's pit;

5) Jean Buchanan specifically told Allan Tesche, municipal attorney and attorney of record in this case; that the Spendlove pit was the pit referred to in the application;

6) Spendlove's gravel pit was within the jurisdiction of the Hillside Community Council: the council was waging dn open campaign of newspaper advertisings and bumper stickers against Mr. Spendlove's pit; the campaign focused on drawing a parallel between the notorious 'Hillside' rapist in California(which was receiving national coverage), and Mr. Spendlove's gravel operation in the "Hillside' area of Anchorage. The judge was aware of this campaign. [TR.,551-577]

ARGUMENT

I. CONSTITUTIONAL FACT - THE DOCTRINE OF JURISDICTIONAL FACT IN A SPECIAL FORM: A JUDGE SERVING AS A VICE-CHAIRMAN OF AN ORGANIZATION RECEIVING FUNDING FROM DEFENDANTS: AND PRESIDING IN A SUIT THE DEFENDANTS ARE PARTY TO: IS PRECLUDED ON CONSTITUTIONAL GROUNDS FROM HEARING THE CASE AND MUST RECUSE HIMSELF

The federal right to an unbiased judge and a judge without a conflict of interest, is protected by the Fourteenth Amendment.

The doctrine of Constitutional Fact is the doctrine of jurisdictional fact in a special form. The Constitutional Fact question arises where the fundamental or jurisdictional determinations of fact revolve around the observance of Constitutional restrictions in actions brought to enforce Constitutional rights. Crowell v. Benson, 285 U.S. 22(1932); Fiske v. Kansas, 274 U.S. 380,385-386(1927); Creswill v. Pythias of Georgia, 225 U.S. 246,261(1912);

St. Joseph Stockyards v. United States, 298 U.S. 38,49-53(1936).

Alaska Statute 22.20.020, Disqualification of judicial officer for cause; is jurisdictional. The state judge had no jurisdiction under the statute to hear the case; recusal was mandatory; based on the Constitutional jurisdictional facts: the judge was being financed by both parties defendant; and his committee was specifically attempting to shut down plaintiff's gravel pit.

The Supreme Court of the United States does review jurisdictional facts; where a conclusion of law as to a Federal right and a finding of fact are so intermingled; as to make it necessary to analyze the facts in order to pass on the Federal question. Northern Pacific R. v. North Dakota, 236 U.S. 585,593; Aetna Life Ins. v. Dunken, 266 U.S. 389,394, and cases cited.

II. LACK OF JURISDICTION IS NOTICEABLE AT ANY STAGE OF THE PROCEEDINGS: EVEN ON THE COURT'S OWN MOTION

Lack of jurisdiction is noticeable at any stage of a case's proceedings; jurisdiction is primary and fundamental to a court's authority; and can be noticed by a court on its own motion. Sumner v. Mata, 449 U.S. 539,547; Louisville and N.R.Co., v. Mottley, 211 U.S. 149(1908).

The state court had no jurisdiction to proceed because of the fundamental denial of Due Process. A state judge with a direct conflict of fianacial interest, and leadership in a group advocating shutting down the gravel pit in contention; is barred by the principle of Due Process under the Fourteenth Amendment.

III. THE STATE SUPREME COURT REFUSED TO ADDRESS THE JURISDICTIONAL ISSUE OF A.S. 22.20.020; ORIGINALLY ARGUED ON APPEAL AND AGAIN IN THE PETITION FOR REHEARING: SINCE THE ISSUE IS FUNDAMENTAL AND JURISDICTIONAL: FAILURE TO ADDRESS THE ISSUE IS PRESUMPTIVELY A DENIAL OF THE FEDERAL ISSUE

There is no non-federal ground of decision that can override the Federal issue of lack of jurisdiction under the Due Process clause.

The state supreme court never addressed the primary issue of jurisdictional Due Process: the court's silent treatment is an untenable state ground.

When the non-federal ground is so interwoven with the federal so as not to be an independent matter, the federal jurisdiction is plain. Moran v. Horsky, 178 U.S. 205; Creswill v. Knights of Pythias, 225 U.S. 246,261. When the state and federal claims come into conflict, the primacy of federal power requires that the federal finding of fact control. England v. State Board of Examiners, 375 U.S. 411,415-417(1964); Townsend v. Sain, 372 U.S. 293,311-312(1963).

If the United States Supreme Court is unable to discover an adequate non-federal ground in support of the state court judgment

on the issue of jurisdiction; '[i]t will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction.' Klinger v. Missouri, 13 Wall 257,263; Johnson v. Risk, 137 U.S. 300,307; Lawrence v. State Tax Commission. 286 U.S. 276,282-283.

IV. AN ATTACK UPON THE CONSTITUTIONALITY OF A STATE STATUTE IS TIMELY IF RAISED IN A PETITION FOR REHEARING: WHEN THE ACT COMPLAINED OF IS THAT OF THE STATE SUPREME COURT

The failure of the Alaska Supreme Court to address the federal question of jurisdiction - the recusal of the state judge under the Fourteenth Amendment; gave rise to the additional federal claim that A.S. 22.20.020 was unconstitutional as applied by the state Supreme Court; who sub silencio affirmed the lower court's recusal denial.

The petition for rehearing timely

raised the federal appeal issue; because that was the first opportunity to address the state supreme court's construction of the statute. [Jurisdictional Statement,p.32] Brinkerhoff-Faris Co. v. Hill, 281 U.S.673, 677-678(1930).

The act complained of is that of the state supreme court. The court cannot ignore the fundamental jurisdictional question presented under the Fourteenth Amendment; without itself putting an unconstitutional construction on the state statute.

The construction of a state statute that infringes federal rights may be first presented by petition for rehearing. Missouri ex rel Missouri Ins. Co. v. Gehner, 281 U.S. 313,320(1930); Pruneyard Shopping Center v. Robins, 447 U.S. 74,84-87(1980).

V. DEFENDANTS ADMIT THAT THE FEDERAL QUESTION OF THE JUDGE'S FAILURE TO RECUSE HIMSELF; WAS PRESENTED IN THE STATE SUPREME COURT

Defendants admit that the federal question was timely submitted to the state supreme court. [Motion to Dismiss,p.8]

Plaintiff and defendants argued the issue in their briefs before the state supreme court. [Plaintiff's state brief, pp.27-29; defendants' state brief,pp.60-64]

CONCLUSION: The United States Supreme Court should take appellate jurisdiction of this appeal: the issue presented strikes at the most basic and fundamental jurisdictional issue: the Right to an unbiased and impartial judge; the Right to have a judge hear the case, who does not have a direct financial stake in the issues.

The disqualification is based on the 'appearance' of bias; in this case there is bias in fact. RESPECTFULLY SUBMITTED, August,1985.

Rodney Spendlove